

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SYLVIA DIFFEY)	
Claimant)	
VS.)	
)	Docket No. 198,307
HOMELAND STORES)	
Respondent)	
AND)	
)	
NATIONAL UNION FIRE INSURANCE CO NY)	
Insurance Carrier)	

ORDER

On April 22, 1997, the application of claimant for review by the Workers Compensation Appeals Board of an Award issued by Special Administrative Law Judge Douglas F. Martin on November 18, 1996, came on for oral argument.

APPEARANCES

Claimant appeared by and through her attorney, Robert R. Lee of Wichita, Kansas. Respondent and its insurance carrier appeared by and through their attorney, Jeffery R. Brewer of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Special Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

What is the nature and extent of claimant's injury and/or disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant suffered accidental injury from May 1993 through her last day worked on April 22, 1995. The parties have stipulated to this accident date as well as to the fact that claimant suffered a 3 percent functional impairment to the body as a whole based upon a split of the functional impairment ratings by Dr. Ernest R. Schlachter and Dr. Steven J. Howell, an orthopedic specialist and foot surgeon.

Claimant was a journeyman food clerk and checker who also did some bagging, floral arranging, worked health and beauty aids, was a stocker, and took inventory. Claimant testified she did everything at respondent's store except cut the meat. Claimant suffered a series of injuries to her feet from working on respondent's concrete floor over a period of several years. She obtained medical treatment from Dr. Harold Sauder, the authorized treating physician. Neither the medical reports of Dr. Sauder nor his testimony were included in the record. Claimant was referred by Dr. Sauder to Dr. Howell, whose medical records are included in the record. She was later referred to Dr. Earnest R. Schlachter by her attorney for an independent medical examination.

Claimant continued working for the respondent and was eventually released from Dr. Howell's care with certain restrictions. During the period of May 1993 through her last day worked April 22, 1995, claimant missed only one and one half days of work. This was caused when the cast, placed on her foot by Dr. Sauder, was put on wrong and had to be redone. Subsequent to her employment with respondent claimant continued taking classes at the Independence Community College as a full-time student. She also worked part-time with the Independence Community College as a marshal art's instructor and has been doing this since 1975. Claimant limits the teaching that she does in marshal arts to specific types of marshal arts which involve the upper extremities and limit the use of the feet and legs.

K.S.A. 44-510e states in part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between

the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.

"An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at time of the injury."

The Administrative Law Judge found claimant to have suffered a loss of ability to perform work tasks of 58 percent. This issue was not appealed and was not argued by the parties before the Appeals Board. As such, the Appeals Board finds this to be supported by the credible evidence and finds that claimant has suffered a 58 percent loss of ability to perform the work tasks which she performed over the previous 15 years.

The only issue argued before the Appeals Board deals with claimant's average weekly wage postinjury. The parties stipulate that on the date of injury claimant was earning an average weekly wage of \$494.71 which includes \$87.30 in fringe benefits. Karen Crist Terrill, the only vocational rehabilitation expert to testify in this matter found that claimant was currently earning \$161.00 per week postinjury. She went on to find claimant had the ability to earn \$6.50 an hour over a 40-hour week which is \$260.00 per week. The Administrative Law Judge, in relying on the finding that claimant had the ability to earn \$260.00 per week, used the ability test in estimating claimant's ultimate work disability. K.S.A. 44-510e was amended by the legislature in 1993. Before July 1, 1993, the test of work disability considered the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced. The legislative intent, in modifying K.S.A. 44-510e and eliminating an employee's "ability" is clear. The language of the statute considers only what the worker does, in fact, earn after the injury, not what she or he could earn. In this instance, the Appeals Board finds a proper application of K.S.A. 44-510e would require a consideration of claimant's actual earnings subsequent to the injury rather than a consideration of the ability claimant displays. As such, the Appeals Board finds claimant has a postinjury wage of \$161.00. When compared with the stipulated wage of \$494.71 the Appeals Board finds that claimant has suffered a 67 percent loss of wage earnings as a result of this injury. When considered with the 58 percent task loss, the Appeals Board finds claimant has suffered a work disability of 62.5 percent as a result of the injury suffered through April 22, 1995, while employed with respondent.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the November 18, 1996, Award of Special Administrative Law Judge Douglas F. Marin should be, and is, hereby, modified and an Award of compensation is made made in accordance with the above findings in favor of claimant, Sylvia Diffey, and against respondent, Homeland Stores and its insurance carrier National Union Fire Insurance Company NY, for an injury suffered through April 22, 1995.

Claimant is entitled to 259.38 weeks permanent partial disability compensation at the maximum rate of \$319.00 per week for a total award of \$82,742.22. As of April 29, 1997, there would be due and owing to claimant 105.57 weeks permanent partial disability compensation at the rate of \$319.00 per week \$33,734.25 which is ordered paid in one lump sum minus amounts previously paid. Thereafter, the remaining balance of \$49,007.97 shall be paid at the rate of \$319.00 per week for 153.63 weeks until fully paid or until further order of the Director.

In all other regards, the Award of Special Administrative Law Judge Douglas F. Martin shall be affirmed insofar as the findings therein do not contravene the opinions expressed herein above.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

Karen Starkey, CSR

Transcript of Regular Hearing on February 14, 1996	\$180.60
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Alexander Reporting Co.

Deposition of Ernest R. Schlachter, M.D.	\$103.65
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CSR Court Reporting Service

Deposition of Karen Crist Terrill	\$154.15
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Deposition of Robert Wayne Killingsworth	\$ 79.30
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Deposition of Steven J. Howell, M.D.	\$ 76.15
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Statutory Special Administrative Law Judge Fee	\$150.00
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IT IS SO ORDERED.

Dated this ____ day of May 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert R. Lee, Wichita, KS
Jeffery R. Brewer, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director